IN THE HIGH COURT OF SINDH, AT KARACHI

C.P No. D-1169 of 2021

Present:-
Ahmed Ali M. Shaikh CJ &
Yousuf Ali Sayeed, J

Petitioner	:	Mazhar Ahmed and Dr. Muhammad Khalid Siddiqui through Mr. Badar Alam, Advocate.
Respondent No.1	:	Province of Sindh, through Abdul Jalil Zubedi, AAG
Respondents Nos. 2 to 4	:	Nemo
Date of hearing	:	07.12.2021

JUDGMENT

Yousuf Ali Sayeed, J – Through this Petition under Article 199 of the Constitution, the Petitioners have sought to impugn an Order made by a learned Additional District Judge on 04.09.2020, dismissing their Petition for Letters of Administration under the Successions Act, 1925 (the "**Act**"), and while doing so have also seen fit to question the competence and fitness of the judicial officer and level certain allegations as regards his conduct during the proceedings, with it being prayed that the impugned Order be set aside as being unfair, biased and contrary to law, and that the Member Inspection Team (MIT) of this Court (arrayed as the Respondent No.4) and/or the concerned District and Sessions Judge (arrayed as the Respondent No.3) be directed to monitor the performance of the learned ADJ and submit a report to this Court for further order as to his capacity, capability and legal acumen to hold that post. Being cognizant of the sensitivity of the matter, we have consciously refrained from identifying the judicial officer through reference to the concerned Court or proceedings so as to obviate the scope of further scandal and embarrassment.

2. Succinctly stated, the backdrop to the matter is that the Petition filed under the Act was dismissed vide the impugned Order with the finding that a will executed by a Mohammadan (i.e Muslim) could not be enforced under the provision of the Act, hence probate could not be granted in respect thereof, as had been sought through those proceedings.

3. Proceeding with his submissions, learned counsel argued that the impugned Order was patently defective and contrary to law, thus reflected marked ineptitude on the part of the concerned judicial officer and demonstrated that he was unaware of the basic principles of law with which he ought to be conversant in order to hold the high office of an ADJ. However, on query posed as to how the impugned Order could be assailed directly through recourse to the writ jurisdiction of this Court when an appeal lay in the matter under Section 299 of the Act[1], the only response forthcoming was that such a step had been taken as one of the purposes of the Petition was to bring the ineptitude and misconduct of the judicial officer to the notice of this Court for purpose of Article 203 of the Constitution. In an endeavour to support that contention, he placed reliance on the case reported as Messrs Shaheen Air International Ltd. (SAI) and others v. Messrs Voyage De Air and others 2006 SCMR 1684.However, it was conceded that no complaint on that note had been filed on the administrative side.

4. Needless to say, it is well settled that the jurisdiction under Article 199 is not to normally be exercised where an alternate remedy is provided[2].

[1] "299. Appeals from orders of District Judge. Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908 (V of 1908), applicable to appeals".

[2] Messrs. Recorder Television Network (Pvt.) Ltd. through Chief Executive Officer vs. Federation Of Pakistan through Secretary, Ministry of Information and Broadcasting, Islamabad and another 2013 MLD 99, The Tariq Transport Company, Lahore vs. (1) The Sargodha-Bhera Bus Service, Sargodha, (2) the Regional Transport Authority, Lahore, and (3) the Provincial Transport Authority, Lahore PLD 1958 Supreme Court (Pak.) 437.

5. Furthermore, whilst considering the matter, it is noteworthy that over and above the existence of the alternate remedy clearly available under Section 299 for assailing the impugned Order, a degree of immunity stands conferred on judicial officers in terms of Section 1 of the Judicial Officers' Protection Act, 1850, which mandates that:

> "**1. Non-liability to suit of officers acting judicially, for official acts done in good faith, and of officers executing warrants and Orders.** No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

6. As to the scope for Article 199 of the Constitution to be set in motion on the touchstone of Article 203, it merits consideration that in the case Shaheen Air (Supra), the Honourable Supreme Court held that:

> "10. Various Articles of the Constitution and various provisions of other laws provide that High Court exercises Revisional, Appellate and Constitutional jurisdiction. Any remedy to an aggrieved person in judicial matters can be granted by High Court while exercising aforesaid powers, in addition to the one contemplated by section 151, C.P.C. and section 561-A, Cr.P.C. From the very language of Article 199 and Article 203 of the Constitution it becomes abundantly clear that Article 203 is not meant to be invoked by a party nor is the Court required by Article 203 of the Constitution to provide any relief to any party to a cause.
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> According to their Lordships of the Privy Council, the superintendence of the High Court analogous to Article 203 of our Constitution includes the authority to direct inquiry with a view to take disciplinary action in cases of flagrant maladministration of justice. Cases came up before the Supreme Court of India where scope of section 107 of the Government of India Act, 1915 and Article 227 of the Indian Constitution came under

> discussion. Article 227 of the Indian Constitution substantially carries the same effect as the provisions of Article 203 of the present Constitution and Article 102 of the Constitution of 1962. The view taken was that the powers in question of the High Court are to supervise and control all Courts subordinate to it. It is meant to enable High Court to discharge its duties as a superior Court towards fair and proper administration of justice. It has the authority to check and prevent dereliction of duty and to stop as well as correct violations of law. Such supervisory jurisdiction is for making and keeping the administration of justice pure and not to help any particular party.
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> 12. Borrowing words therefrom, we would say that a duty under Article 203 of the Constitution can be performed irrespective of whether anybody will be harmed or not and irrespective of whether anybody will be benefited by it or not. The object of this provision is to enable the High Court to establish orderly, honourable, upright and impartial and legally correct administration of justice. See The King v. Richmond Confirming Authority (1921) 1 KB 248. Terminology used in Article 203 of the Constitution does not contemplate that High Court should issue an order against a party to a cause as such. It is concerned only with the Courts subordinate to it rather than with the parties to a cause.
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> 13. In the instant case the respondent through a petition under Article 203 of the Constitution has clearly attempted to get a judicial order set aside, passed by a subordinate Court of competent jurisdiction in judicial proceedings pending before it. Such remedy analogous to revisional, appellate or Constitutional powers within the contemplation of Article 199 of the Constitution, cannot be substituted by invoking jurisdiction under Article 203 of the Constitution. No doubt, through the impugned order, the learned counsel for the respondents seems to have abandoned his material claims formulated in petition before the High Court and confined himself to obtain the directions regarding implementation of the orders, but still, has obtained a verdict having the effect of a verdict of the High Court and not that of the subordinate Courts which, even otherwise, had all the powers under the law to implement their own orders regardless of any superintendence by the High Court. Indirectly, the judicial orders of the subordinate Courts referred to in the impugned order seem to have merged into the impugned order of the High Court. This by no means is the intention of Article 203 of the Constitution.

7. As such, it is apparent from a plain reading of that binding precedent that the same is of no avail to the Petitioners, and in fact establishes that a Petition under Article 199 of the Constitution is not the appropriate vehicle for espousing a

claim of impropriety or misconduct against a judicial officer, which could best be looked into and attended on the administrative side in terms of the Sindh Judicial Service Rules, 1994 upon a complaint being competently filed in that regard.

8. We are further fortified in that assessment by the judgments of the Honourable Supreme Court in the cases reported as Miss Nusrat Yasmin v. The Registrar, Peshawar High Court, Peshawar and others PLD 2019 Supreme Court 719, and in CPLAs No.1862-L & 1863-L of 2021 captioned (Against the strictures passed by the Lahore High Court, in its judgment dated 22.6.2021 delivered in FAO No.28948/2019).

9. In the former case, an Additional District and Sessions Judge, Peshawar had approached the Apex Court seeking expunction of certain strictures recorded against her in a judgment of the High Court. Whilst examining the question of whether it was befitting and appropriate for the High Court to record judicial stricture (i.e., a stricture recorded in a judgment) against a judge of the District Judiciary relating to his or her ability, conduct, integrity, diligence, behaviour, temperament and competence, while examining his or her judgment or whether those concerns could only be addressed through administrative disciplinary proceedings by invoking the supervisory jurisdiction under the Constitution, it was held that:

> "The High Court while adjudicating a lis is free to examine all aspects of the case that are necessary and integral for the determination of the case and this includes, in a particular case, bias or malice on the part of the judge of the District Judiciary, if the record of the case supports it. This, at best, will result in setting aside the impugned judgment on the ground of bias or malafide. The High Court, while exercising constitutional, appellate or revisional jurisdiction under various laws is to judicially examine and review the orders and judgments of the courts below on questions of law and facts. What is under examination on the judicial side is the legal reasoning behind the order or the judgment. Error, if any, in the legal reasoning, application of law or appraisal of evidence

by the courts below, is rectified by the High Court, in accordance with the law, which may include the ground of bias or malice. Stricture recorded in a judgment, on the other hand, is “a severe” and a “sharp criticism or a censorious remark[2]” and is akin to a “piece of censure[3]” and passes for a “critical remark”[4] regarding the conduct, integrity, diligence, behaviour, temperament, and competence of a judge. Stricture becomes accessible and remains in the public domain (as part of the judgment) for posterity. Subsequent exoneration of the judge in departmental disciplinary proceedings cannot undo the damage already done, as the stricture continues to exist in the judgment and the mind of the public. Strictures do not restrain the judge from continuing as a judge but at the same time, shatter his confidence and weaken his performance. There is nothing reformative about a judicial stricture and is a stigma thrust upon a judge with no formal legal recourse to undo it. Public disgrace suffered at the hands of the judicial strictures remains in the public memory, as if, etched in stone.[5] Fazal Karim J., a distinguished judge of this Court, in Muhammad Mansha v. The State[6], observed:

> “2. The subordinate Courts or the inferior Courts as they are sometimes called are an integral part of the judicial system of our country. The description "inferior Courts", or "inferior tribunal" is a categorising and not a derogatory description. Such Courts or tribunals "are not inferior in the doing of justice; nor in the judges who man them, nor in the advocates who plead in them" (Lord Denning in 'Attorney-General v. B.B.C. (1981) A.C. 303, 313). The rule of law depends upon public confidence and public acceptance of the judicial system; therefore, anything which tends to undermine that confidence in the judicial system must be strongly discountenanced. It is for these reasons that we feel that the observations in the order of the learned Judge in the High Court that there were some extraneous considerations which weighed with the learned Additional Sessions Judge for granting bail to Mansha and the direction in para. 9 of the judgment that "Mr. Ghulam Mustafa Shahzad, Additional Sessions Judge, Sheikhupura to appear in person before this Court on 14-11-1995" should not have been made. The sweeping condemning observation that the learned Additional Sessions Judge was moved, in making the impugned order, by "extraneous considerations" and the direction referred to above, must necessarily shake the public confidence' at least the confidence in that officer of the people of the district where he is for the time being serving; it is the more serious because the officer had had no opportunity of explaining his position before the observation was made.”

Therefore, it is desirable that the High Court, while performing its judicial function, avoids passing strictures regarding the ability, competence, integrity, and behaviour of the judge whose judgment is under scrutiny before it. A judge of the High Court, even if unhappy over the quality of the judgment under challenge, must not let go of judicial precaution and propriety and restraint from making a personal remark. The articulation, scholarship and legal

reasoning of the judgment of the High Court, couched in moderation, temperance, and sobriety, will automatically highlight the error and mistake of the lower Court. The High Court is not to assume the role of a critic of the personal attributes and abilities of the judge. Instead the High Court, maintaining its judicial majesty, is to focus only on the legal reasoning of the judgment under challenge. Passing strictures and publically rebuking, condemning and reproaching a judge does not sit well with the judicial character of the High Court. It is equally inappropriate to summon a judge of the District Judiciary to court for a public reprimand, during the hearing of the case against his judgment, in open Court. The character of judicial determination by the High Court does not allow the court to go beyond and assess, evaluate and appraise the competence, diligence, conduct, integrity or temperament of a judge of the District Judiciary, other than judicial bias or malice if it is borne out from the record of the case and is essential for the determination of the lis. Needless to mention, that it equally necessary for a judge of the District Judiciary to refer or distinguish the judgments of the superiors courts with care, caution and respect. The "judicial powers" enjoyed by the High Court are only to examine the legality of the order or judgment/decree passed by the judge of the District Judiciary. The observations of this Court made in Abdul Khaliq v. Khan Bahadur[7] may advantageously be referred in this regard. This Court observed:

> "3. The complainant filed a revision application before the Bench of Lahore High Court at Rawalpindi and the learned Judge in Chamber vide order dated 20-11-1995 impugned before us in this petition has cancelled the bail. Perusal of the impugned order shows that the learned Judge of the High Court in Chamber had called the Magistrate and asked from him as to why had [he] granted bail in that case. This amounts to reprimand and we do not approve such action by the Judges of the superior Courts. If judicial order is found not to have been passed in accordance with law, it can be set aside by the upper forum which is competent to do so. Even the learned Judge in the High Court could have set aside the order according to law, if he came to such conclusion, without calling the Magistrate with a view to reprimand him." (emphasis supplied)

5. While it is not in the majesty, character, and dignity of the High Court or the justice system to pass judicial strictures and summon judges of the District Judiciary in open court, it is eminently within the constitutional domain of the High Court and indeed desirable that the High Court, where appropriate, exercises supervisory control over the District judiciary through administrative disciplinary mechanisms.[8] The power to supervise and control the District Judiciary is to be exercised by the High Court (Chief Justice and Judges of the Court) under Articles 202 and 203 of the Constitution while exercising its administrative authority. This constitutional responsibility vests in the High Court and not in a judge of a High Court exercising judicial power.

10. In the latter case, two judges of the District Judiciary of Punjab had approached the Apex Court in the same vein, seeking redressal of their grievance against certain strictures and directions passed against them by the Lahore High Court in its judgment while deciding appeals against their judicial orders. In that context, after recapitulating the principles laid down in the case of Nusrat Yasmin (Supra), it was held that:

> "Public reprimand of a judge of the lower court regarding his judicial conduct by an appellate court while sitting in judgment over his or her judicial decision, either by recording a stricture or a censorious remark in its appellate judgment or by summoning the judge and reproaching him orally in open court, does not behove the judiciary of a constitutional democracy which boasts of the independence of judiciary as its salient pillar. Any such public condemnation of a judge lowers the public trust in the judicial institution, besides the harmful effect it has on the morale and confidence of the judge concerned as well as of his colleagues.
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> 4. The District Judiciary is the backbone of our judicial system, and the judges of the District Judiciary perform the onerous task of dispensing justice at the frontline by dealing with a large number of cases in a difficult and demanding environment. The judges of the higher courts must appreciate the stressful and challenging conditions in which these judges perform. Our judicial system acknowledges the fallibility of judges, and hence provides for appeals and revisions. Higher courts everyday come across orders of the lower courts which are not justified either in law or in fact and modify or set them aside; that is the function of an appellate court. It is often said that a judge who has not committed an error is yet to be born. This applies to all judges, no matter how high or low in rank they maybe. The intemperate or extravagant criticism on the ability of a person having a contrary view is often founded on one's sense of his own infallibility. This must be avoided, and the judicial approach should always be based on the consciousness that everyone may make a mistake. While examining the decision of a court below, the higher court is to assess the reasoning and the legality of the decision challenged before it and not the ability or conduct of the author judge. The latter is the function of the disciplinary authority. The higher court, if so decides, can refer the matter to the disciplinary authority, in the manner elucidated in *Nurat Yasmin case,* only on the administrative side."

11. As such, it is evident that the Petition is not maintainable, from the standpoint of the challenge to the impugned Order in view of the appellate remedy available under the Act, and is misconceived from the standpoint of Article 203 in view of the judgments of the Honourable Supreme Court. On that note, we are constrained to observe that the real motive of the Petition appears to be to scandalise a judicial officer so as to compromise his standing, which is regrettable and of course deprecated.

12. In view of the foregoing, the Petition fails and is accordingly dismissed with costs of Rs.25,000/- being imposed on each of the Petitioners, to be deposited towards the High Court Clinic within a period of 7 days from the date of announcement of this judgment.

JUDGE

Karachi
Dated _____

CHIEF JUSTICE